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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Amendment of Section 73.202(b))	MB
of the Commission's Rules, Table of Allotments,)	MM Docket No. 05-112
FM Broadcast Stations)	RM-11185
(FREDERICKSBURG ET AL., TEXAS))	RM-11374 FILED/ACCEPTED

JUN 15 2007

Federal Communications Commission
Office of the Secretary

To: The Office of the Secretary,
for the Attention of the Assistant Chief, Audio Division, Media Bureau

REPLY COMMENTS TO COUNTERPROPOSAL

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SUMMARY

These are the Reply Comments of Munbilla Broadcasting Properties, Ltd. (*MPBL*) in MM Docket 05-112 (Fredericksburg et al., Texas), in response to the Commission's Public Notice, Report No. 2814 (rel. May 31, 2007.) The Public Notice assigned the Rule-Making Number RM-11374 to a Counterproposal filed by a group of entities —Rawhide Radio, LLC, Clear Channel Broadcasting Licenses, Inc., CCB Texas Licenses, L.P., and Capstar TX Limited Partnership (collectively, *CC/R*). The Public Notice solicited Reply Comments supporting or opposing the Counterproposal.

The original petitioner has withdrawn her expression of interest, and it appears that only *CC/R* filed a Counterproposal. However, the Counterproposal is fatally flawed, because one of its elements is short spaced to a validly granted Construction Permit held by *MBPL*, and also because the Counterproposal is duplicative of a Counterproposal filed in an earlier, still-open proceeding, MM Docket 00-148.

With the original petitioner having withdrawn her expression of interest, and only a flawed Counterproposal left before it, the staff should, on delegated authority:

- dismiss the original petition, per the petitioner's request;
- dismiss the fatally defective Counterproposal; and
- terminate this proceeding.

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REPLY COMMENTS TO COUNTERPROPOSAL

Munbilla Broadcasting Properties, Ltd. (*MPBL*), by its communications counsel, hereby
files Reply Comments to the Counterproposal of Clear Channel Licenses, Inc. in this proceeding.

I. BACKGROUND

THE PETITION AND THE NPRM

1. On November 16, 2004, Katherine Pyeatt filed a Petition for Rule Making. She asked the Commission to allot Channel 256C3 to Fredericksburg, Texas as a, "first competing FM service." Her Petition noted that the proposal was short-spaced to a rejected proposal to allot Channel 256A to Harper, Texas. Her Petition also noted that the dismissal was effective, even though the rejection was not final, because an Application for Review was pending.¹ She further noted a conflict between her proposal and a Petition for Rule Making to allot Channel 256A to Ingram, Texas that the Commission's staff had also rejected. She further noted that,

¹ Ms. Pyeatt provided a copy of the FCC staff letter rejecting the Harper proposal. The basis for the rejection was that Channel 256A at Harper was short-spaced to a Counterproposal that had been filed earlier in MM Docket No. 00-148, and that the Harper Petition had been filed after the deadline for Counterproposals in that docket.

although the dismissal of the Ingram Petition was not final, it was effective. In addition, Ms. Pyeatt also noted that her proposal conflicted with the legacy facilities of station KAYG, Channel 256A, Camp Wood, Texas, which station's license had, in MM Docket No. 99-214, been modified to specify Channel 251C3.

2. Ms. Pyeatt's Petition prompted the Media Bureau to issue the Notice of Proposed Rule Making in the instant proceeding, 20 FCC Rcd 6009, 70 Fed. Reg. 17044 (2005) (the NPRM). The NPRM proposed to allot Channel 256C3 to Fredericksburg, but cautioned interested parties that, pursuant to Auburn, Alabama, et al., 18 FCC Rcd 10333 (MB 2003), the proposed Fredericksburg allotment could only be granted subject to the outcome of MM Docket No. 00-148, due to the conflict with the dismissed Ingram proposal (which dismissal was not yet final). The NPRM also cautioned that the outcome of the Harper proceeding could also affect the outcome of the Fredericksburg proceeding. With those caveats, the NPRM solicited Counterproposals, to be filed by May 9, 2005.

B. CC/R's COUNTERPROPOSAL

3. On May 9, 2005, a group of entities —Rawhide Radio, LLC, Clear Channel Broadcasting Licenses, Inc., CCB Texas Licenses, L.P., and Capstar TX Limited Partnership (collectively, *CC/R*) — filed a *multielement Counterproposal*. In the *Summary* section of its Counterproposal, CC/R said that:

“This counterproposal is the same as [CC/R's] pending proposal in MM Docket No. 00-148, [whose rejection as fatally flawed] is now on Application for Review before the

Commission.[2] Should that [Counter]proposal be dismissed or denied on procedural grounds, [CC/R] wish[es] to have it considered in this proceeding. This [C]ounterproposal is proper in the context of this proceeding. The Commission itself, in the [NPRM], noted the that petitioner's proposed allotment of Channel 256C3 at Fredericksburg is mutually exclusive with [CC/R's] pending proposal because of its substitution of Channel 256A at Ingram, Texas.

4. At Paragraph 51 of CC/R's Counterproposal, in discussing one element of its Counterproposal (the requested substitution of Channel 297A for Channel 242A at Llano, Texas, occupied by station KQBT, FCC Facility ID No. 87996), CC/R stated the following:

51. The Burnet application, File No. BPH-20030902ADU, does not protect [CC/R's Counter] proposal, and thus is contingent upon action in this proceeding. The Commission has not yet granted the application, and is holding the application in its pending queue. The application could be combined and considered as a counterproposal in this proceeding.

CC/R included with its Counterproposal an Engineering Statement, dated June 21, 2004, that purported to show that the Counterproposal satisfied the spacing and city-grade-service requirements applicable to each of its elements.

5. On May 31, 2007, the FCC issued a Public Notice, Report No. 2814, that assigned to CC/R's Counterproposal the Rule-Making Number RM-11374.³ That Public Notice also

²CC/R's Counterproposal in MM Docket No. 00-148, to which CC/R referred, is the same Counterproposal to which the FCC staff referred in its letter rejecting the Harper, Texas proposal (a copy of which staff letter Ms. Pyeatt had provided as Attachment B to her Fredericksburg Petition for Rule Making). See n.1, supra.

³The Public Notice described the Counterproposal as follows:

(a) the substitution of Channel 247C1 for Channel 248C at Waco, Texas, the reallocation of Channel 247C1 from Waco, Texas to Lakeway, Texas, and the concomitant modification of the license of station KWTX;

(b) the substitution of Channel 243C2 for Channel 244C1 at Georgetown, Texas, the reallocation of Channel 243C2 from Georgetown, Texas to Lago Vista, Texas, and the

solicited Reply Comments to that Counterproposal. MBPL is filing these Reply Comments in response thereto.

C. MS. PYEATT'S WITHDRAWAL

6. On August 11, 2005, Ms. Pyeatt withdrew her Petition for Rule Making requesting the allotment of Channel 256C3 to the community of Fredericksburg, Texas. Further, it appears that no other party has expressed an interest in the allotment and applying therefor.

II. ARGUMENT: THE COMMISSION SHOULD TERMINATE THIS PROCEEDING WITHOUT MAKING ANY OF THE REQUESTED ALLOTMENTS

7. As MBPL will now demonstrate, the Commission should terminate this proceeding without allotting any of the channels requested, for two reasons.

concomitant modification of the license of station KHFI-FM;

(c) the substitution of Channel 249A for the present Channel 297A at Nolanville, Texas, and the concomitant modification of the license of station KLFX;

(d) the substitution of Channel 245C1 for Channel 247C at San Antonio, Texas, and the concomitant modification of the license of station KAJA; and

(e) the reallocation of Channel 249C1 from McQueeney to Converse, Texas, and the concomitant modification of the license of station KLTO-FM.

In fact, there are three other elements to the Counterproposal that the Public Notice omitted. These are:

(1) the substitution of Channel 297A for the present Channel 242A at Llano, Texas, and the concomitant modification of the license of station KQBT, with a change in transmitter site;

2) the substitution of Channel 256A for the vacant Channel 243A at Ingram, Texas; and

3) the allotment of Channel 232A to Flatonia, Texas.

A. NO ONE HAS A PRESENT INTEREST IN CHANNEL 256C3 TO FREDERICKSBURG

8. Ms. Pyeatt initially expressed interest in the allotment of Channel 256C3 to Fredericksburg. She did so both in her Petition for Rule Making, and in her Comments — dated April 25, 2005, received by the Commission on May 3, 2005 — filed in response to the NPRM. However, as noted above, on August 11, 2005, Ms. Pyeatt withdrew her expression of interest, and it appears that no third party has expressed an interest in the allotment of Channel 256C3 to Fredericksburg. In light of longstanding Commission practice, it would be inappropriate to allot the channel to Fredericksburg. See, e.g., Powers, Michigan, 13 FCC Rcd 22294 (1998).

B. CC/R'S COUNTERPROPOSAL MUST BE REJECTED

1. THE COUNTERPROPOSAL FAILS TO PROTECT STATION KHLE

9. MBPL is the licensee of station KHLE (ex-KHLB), Channel 295A, Burnet, Texas, FCC Facility ID No. 34948. On September 2, 2003, MBPL applied for authority to relocate the station's main transmitter. See FCC Form 301, FCC File No. BPH-20030902ADU. The application was permissibly contingent in two respects. First, MBPL was, at the time, the station's proposed assignee. MBPL subsequently acquired the station. Second, the site change was contingent upon the outcome in a rule-making proceeding (MM Docket 00-148, Quanah, Texas et al.) in which the staff had rendered an initial decision, which decision was (and which remains) the subject of pending administrative reconsideration and review. MBPL's application pointed to the policy set forth in Paragraphs 22-24 of *Auburn, et al, Alabama*, 18 FCC Rcd 1033 (2003), which states that a subsequently filed FM proposal is not required to protect a proposed allotment that has been dismissed but that is the subject of a pending administrative appeal.

10. In the case of MBPL's KHL[E] site-change application, the technical proposal was 3 km short-spaced to the proposed substitution of Channel 297A for Channel 242A at Llano, Texas, part of the Counterproposal in MM Docket No. 00-148 filed by First Broadcasting Company, L.P. et al., RM-10198. The staff had dismissed that Counterproposal as fatally flawed via the Report and Order in MM Docket No. 00-148, 18 FCC Rcd 9495 (MB 2003). That dismissal became effective on the release date (May 8, 2003), and was then the subject of a Petition for Partial Reconsideration and Request for Expedited Action filed on June 16, 2003. The staff subsequently denied the Petition by Memorandum Opinion and Order, 19 FCC Rcd 7159 (MB, 2004). An Application for Review remains pending.

11. The Commission granted the KHLE application on June 29, 2004. The Commission announced the grant on July 1, 2004. See Broadcast Actions, Report No. 457688. The Commission appended various Special Operating Conditions to the grant. Special Operating Condition No. 7 read as follows:

The grant of this permit is conditioned on the final outcome of MM Docket 00-148. The final outcome of that proceeding may require KHL[E] to change frequency, class, or site location. Accordingly, any construction undertaken pursuant to this permit is at the permittee's sole risk. See Meridian Communications, 2 FCC Rcd 5904 (Rev. Bd. 1987).

12. MBPL accepted the Construction Permit with that condition. MBPL was (and remains) willing to bear the risk that the ultimate outcome of MM Docket No. 00-148 might require dismantlement of the facility. Accordingly, MBPL constructed the authorized facility, and filed an application for a license to cover the Construction Permit. See FCC Form 302-FM, File No. BLH-20050307ABE. By Public Notice of March 10, 2005, the FCC announced that it had accepted the license application for filing. See Broadcast Applications, Report No. 25938.

13. As the Engineering Statement that CC/R supplied with its Counterproposal shows, the proposed channel substitution at Llano, a necessary component of the CC/R Counterproposal, short-spaces the BPH-20030902ADU site.⁴

14. Putting aside the (non)issue of whether BPH-20030902ADU would be entitled to full cut-off protection were it still only a pending application,⁵ BPH-20030902ADU — as a granted Construction Permit — is obviously entitled to *full protection from all proposals other than the Counterproposal in MM Docket 00-148*. That includes CC/R's Counterproposal in this — the Fredericksburg — proceeding, MB Docket No. 05-112.

15. Because the Llano-substitution element of CC/R's Counterproposal is short-spaced to MBPL's KHLE Construction Permit, for CC/R's Counterproposal to be acceptable for rule making, CC/R would have to have provided a statement from MBPL either surrendering Construction Permit BPH-20030902ADU for cancellation, or voicing MBPL's consent to yet another KHLE site change. CC/R did not provide any such statement. In point of fact, CC/R did not even try to get one.

16. The failure of CC/R's Counterproposal to protect MBPL's Construction Permit for station KHLE, or alternatively to furnish a statement from MBPL of the type described above, is

⁴The Counterproposal and accompanying Engineering Statement incorrectly described BPH-20030902ADU as a pending application. In reality, the staff had granted BPH-20030902ADU almost a year before the filing of the Counterproposal in this proceeding.

⁵Construction Permit BPH-20030902ADU, even if it were still just a pending application, would nonetheless be entitled to cut-off protection. It was both filed and accepted for filing long before the deadline for the filing of Counterproposals in this proceeding. See, *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC Rcd 4917, 4919 (1992), recons. granted in part, 8 FCC Rcd 4743 (1993).

a fatal defect. It is firmly established Commission policy *not* to force an existing station to change its transmitter site or its community of license.

“[C]lear consent to such changes had to be provided at the deadline for filing counterproposals or [the] counterproposal would not be technically correct or substantially complete. See Llano and Marble Falls, Texas, 12 FCC Rcd 6809, 6810 note 3 (1997) and Claremore, Oklahoma et al., 3 FCC Rcd 4037 (1988). Thus, failure to demonstrate such consent by [Station KHLB] renders [the] counterproposal unacceptable for consideration.”

Parker, Arizona, 17 FCC Rcd 9578 (2002). See also, Murrieta et al., California, 21 FCC Rcd 9440 (2006) at Para. 8 and n. 13:

It is well settled that the Commission will not require the involuntary [...] relocation of its transmitter site to accommodate another rulemaking proposal, absent agreement from the affected station consenting to the [...] transmitter site relocation. *See Claremore, Oklahoma, et al.*, 3 FCC Rcd 4037 (1988), *rev.denied*, 66 RR 2d 225 (1989); *see also Wasilla, Anchorage, and Sterling, Alaska*, 14 FCC Rcd 6263 (MMB 1999).

17. “It is well established that counterproposals must be technically correct and substantially complete when filed and that counterproposals will be considered only if they are filed by the deadline date for comments. See Section 1.420 (d) of the Commission’s Rules, Broken Arrow and Bixby, Oklahoma, 3 FCC Rcd 6507, 6511 (1988) and Springdale Arkansas et al., 4 FCC Rcd 674 (1989), recon., 5 FCC Rcd 1241 (1990).” Parker, supra. The staff has just recently repeated this bedrock principle of allocations jurisprudence. See Grants and Church Rock, New Mexico, DA 07-2196 (rel. May 25, 2007), at Paras. 1, 3, and 4.

18. Because CC/R’s Counterproposal was neither technically correct nor substantially complete when filed on the deadline for Comments in this proceeding, the staff must summarily reject CC/R’s Counterproposal on delegated authority.

19. CC/R has asserted that the Counterproposal need not protect the KHLE Construction Permit because of the condition on the authorization tying its continued vitality to the ultimate outcome in MM Docket 00-148, because the Docket 00-148 and 05-112 Counterproposals are "the same." This statement is factually incorrect, and legally untenable.

2. THE COUNTERPROPOSAL IS DUPLICATIVE.

20. As noted in Paragraph 3, above, CC/R itself described its Counterproposal in this proceeding as, "... the same as [CC/R's] pending proposal in MM Docket No. 00-148...." CC/R pointedly states that it is ***not*** abandoning its Application for Review. See CC/R Counterproposal at Paragraph 3. CC/R is trying to have it both ways. On the one hand, CC/R seeks to keep protection for its original proposal by continuing to seek review of that proposal's dismissal. On the other hand, CC/R seeks to inject a Counterproposal into this proceeding, whose own outcome is expressly conditioned on the ultimate fate of CC/R's Counterproposal in MM Docket No. 00-148.

21. Such bet-hedging and gamesmanship are an unwarranted and impermissible burden on the Commission's scarce processing resources. It is precisely to ***prevent*** such impositions that the Commission has adopted a policy (subject to the limited exception) set forth in Auburn, Alabama et al., *supra*, of not accepting Petitions and Counterproposals whose outcomes are contingent either upon the outcome of an application for construction permit or upon the outcome of another rule-making proceeding. See, e.g., Winslow et al., Arizona, 16 FCC Rcd 9551 (2001); Cut and Shoot, Texas, 11 FCC Rcd 16383 (1996); Oxford et al., Mississippi, 3 FCC Rcd 615 (1988), *recons. den.*, 3 FCC Rcd 6626 (1988). Due to the same concerns, in

application contexts, the Commission has expressly codified a relevant prohibition on such multiple filings. See 47 C.F.R. § 73.3520, the multiple-application rule, which states in pertinent part as follows:

(b) Where there is one application for new or additional facilities pending, no other application for new or additional facilities for a station of the same class to serve the same community may be filed by the same applicant, or successor or assignee, or on behalf of, or for the benefit of the original parties in interest. Multiple applications may not be filed simultaneously.

22. For the very same fundamental concern, the FCC has adopted rules concerning contingent, inconsistent, and repetitious applications (47 C.F.R. §§ 73.3517, 73.3518, 73.3519),⁶ and in FM-Allotment rule making proceedings, has banned the filing of alternative proposals.⁷

23. CC/R has argued, in its July 11, 2005 Reply to Opposition to Motion to Accept Supplement, that if the FCC accepts the Fredericksburg rule-making petition and grants CC/R's Application for Review in MM Docket No. 00-148, "then the two proceedings will need to be

⁶See, e.g., *Atlantic Radio Communications, Inc.*, 7 FCC Rcd 5105 (1992); *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493 (1987); *Valley Broadcasting Co.*, 58 Rad. Reg. (P & F) 2d 945 (1985); *Comark Television, Inc.*, 51 Rad. Reg. (P & F) 2d 738 (1982)

⁷See, Winslow et al., *Arizona*, supra, at Paragraph 9 ("This procedural policy is necessary as such requests have excessively taxed our administrative resources and unreasonably cluttered the Commission's data base system, and in some instances, precluded the acceptance of otherwise viable requests for new or a modification of existing FM facilities.")

MBPL notes that CC/R's Counterproposal in this proceeding is at best equivocal with respect to one of its elements. CC/R states that the Commission can allot Channel 232A to Flatonia, Texas, "... should the Commission desire." Counterproposal at 23. CC/R has suggested this allotment in connection with grey-area concerns. However, CC/R has not specifically requested the allotment, and has not explicitly stated its intent to apply for the allotment if made. CC/R is saying that the FCC can allot the channel if the FCC sees a grey-area problem, but need not allot a channel to Flatonia if it doesn't see a grey-area problem. The dualistic nature of this approach offends the ban on alternative proposals set forth in Winslow, supra.

considered together, just as if the [CC/R] Counterproposal were considered in this proceeding. Either way, the analysis will be the same."

24. MBPL strongly disagrees. The analysis in MM Docket 00-148 is one thing: the analysis in this proceeding is completely different. The vitality of MBPL's Construction Permit for KHLE has absolutely no bearing on the outcome in MM Docket 00-148. The staff dismissed the Counterproposal for completely different reasons. In fact, MBPL's application for Construction Permit was not even on file at the time. But here in Docket 05-112, the protection accorded to that granted Construction Permit vis-a-vis CC/R's subsequently filed Counterproposal is at the heart of the case.

25. When the Commission denies review in MM Docket 00-148, it will do so for a very simple reason that has nothing to do with MBPL's Construction Permit. It will do so because the 00-148 Counterproposal was Dead On Arrival because one of its elements, a proposed substitute allotment at Archer City, Texas, was short-spaced of to an application to upgrade station KICM, Krum, Texas (File No. BMPH-20000725AAZ). If CC/R either does not seek judicial review, or loses once again on appeal (as it should), BPH-20030902ADU will not have influenced that outcome in the slightest. MM Docket 00-148 will then be over, and Special Operating Condition No. 7 appended to that Construction Permit will evaporate.

26. By contrast, in this proceeding, one key, fatal defect in CC/R's Counterproposal is its failure to protect BPH-20030902ADU. By affording to MBPL's CP the protection to which it is due, and by dismissing CC/R's Counterproposal as fatally defective for failing to protect BPH-20030902ADU, the staff can terminate this proceeding. The staff need not wait until the ultimate resolution in MM Docket 00-148 to do so.

27. Beyond the fact that some of the same communities are involved, the one common thread between the two CC/R Counterproposals, as filed, is that they are both fatally flawed, albeit the fatal flaws are different in the two cases. But neither that, nor anything else, is grounds to conflate the two proceedings, as CC/R is wont to do. Moreover, the proposals as filed were and are not technically identical, even though CC/R claims that they are.⁸

28. By simultaneously continuing to prosecute both its administrative appeal of the staff's wholly justified dismissal of the fatally defective Counterproposal in Docket 00-148, and filing and prosecuting the duplicative Counterproposal in this proceeding, CC/R is wasting the Commission's scarce processing resources. If the Commission allows CC/R to engage in such heads-I-win, tails-you-lose gamesmanship, the Commission will be giving *carte blanche* to other purveyors of poorly crafted proposals in the future.

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⁸E.g., in this proceeding, CC/R has attempted to change the reference point for the proposed substitute channel at LLano, after the deadline for Counterproposals.

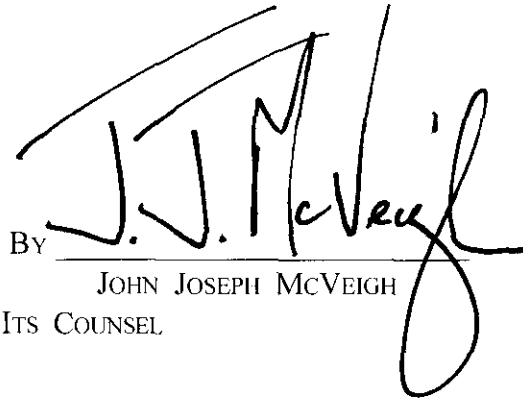
IV. CONCLUSION

29. For the above reasons, the Commission's staff should promptly, and on delegated authority, issue a Report and Order in this proceeding:

- rejecting CC/R's fatally flawed Counterproposal in this proceeding;
- providing to MBPL's Construction Permit, File No. BPH-20030902ADU, the full protection to which the Construction Permit is entitled;
- dismissing Ms. Pyeatt's Petition, as she has requested; and
- terminating this proceeding.

Respectfully submitted,

MUNBILLA BROADCASTING PROPERTIES, LTD.

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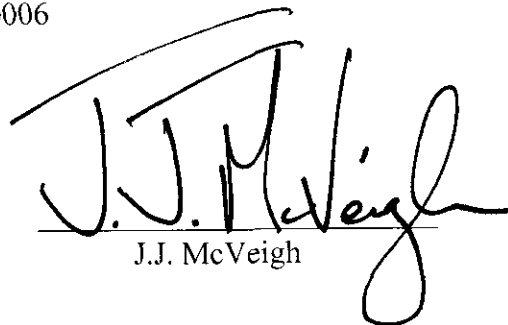
CERTIFICATE OF SERVICE

I hereby certify that I have, this Fifteenth day of June, 2007, sent copies of the foregoing **REPLY COMMENTS TO COUNTERPROPOSAL** by first-class United States mail, postage prepaid, to:

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